



## Referendum on independence for Scotland

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On 15 October 2012 the UK and Scottish Governments signed an agreement under which the Scottish Parliament could organise a referendum on independence for Scotland. The question of a referendum on future constitutional arrangements arose after the Scottish National Party (SNP) won a majority of seats in the Scottish Parliament elections in May 2011. The UK Government issued a consultation paper on 10 January 2012, and the Scottish Government produced proposals on 25 January 2012, in its own consultation document.

There were differences of view as to how a referendum could be organised lawfully, but agreement was reached that there will be secondary legislation under section 30 of the *Scotland Act 1998* to devolve the power to hold a single-question referendum by the end of 2014. The Scottish Government will promote legislation in the Scottish Parliament to set out the details, including the question and the franchise, which it intends to extend for this vote to cover 16 and 17 year-olds. The referendum rules will be based on the provisions of the *Political Parties, Elections and Referendums Act 2000*, with modification for Scottish circumstances. There will be a role for the Electoral Commission in reviewing the proposed question and in certain other aspects of administering the referendum. It will be for the Scottish Parliament to approve the detailed arrangements for the referendum.

The section 30 Order is subject to the affirmative procedure in both Houses of Parliament and in the Scottish Parliament. It was laid before the UK Parliament on 22 October 2012; it will be debated in the Commons on 15 January 2013 and in the Lords on 16 January 2013. The Scottish Parliament approved the Order on 5 December 2012.

On 9 November 2012 the Scottish Government confirmed that its proposed question is “Do you agree that Scotland should be an independent country?” to which voters will be asked to respond “yes” or “no”. This will be assessed by the Electoral Commission to see if it is fair and easily understood.

The debate over an independence referendum, and the conduct of referendums in the UK in general, are covered in Standard Note 5142, [Regulation of Referendums](#), 16 October 2012.

The House of Lords Constitution Committee published [The Agreement on a referendum on independence for Scotland](#) on 13 November 2012. The House of Commons Scottish Affairs Committee published [The Referendum on separation for Scotland: the proposed section 30 Order – can a player also be the referee?](#) on 11 January 2013.

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# 1 Agreement and draft Order

The [Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland](#), signed at Edinburgh on 15 October 2012, includes a summary, a Memorandum of Agreement giving further details, and a draft Order to confer on the Scottish Parliament the legal powers necessary to hold the referendum.

## 1.1 Agreement

The Agreement states that the two governments have agreed to “work together” to ensure that the referendum can take place. They give four criteria for the referendum. It should:

- have a clear legal base;
- be legislated for by the Scottish Parliament;
- be conducted so as to command the confidence of parliaments, governments and people; and
- deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.

The governments agreed to promote an Order in Council under section 30 of the *Scotland Act 1998*. This allows the powers that were reserved under that Act to be modified, by altering Schedule 5 to the Act, in which the reservations are listed. The UK Government believes that the power to hold an independence referendum is currently reserved, under the general reservation of the constitution, and that a referendum held under the law as it currently stands would be unlawful. According to the Agreement, the section 30 Order “will put it beyond doubt that the Scottish Parliament can legislate for that referendum.”

The Agreement concluded that,

The governments are agreed that the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice. The referendum legislation will set out:

- • the date of the referendum;
- • the franchise;
- • the wording of the question;
- • rules on campaign financing; and
- • other rules for the conduct of the referendum.

## 1.2 Memorandum

The Memorandum sets out those parts of the Agreement that need a legislative base in the section 30 Order, and those which were agreed on an inter-governmental basis. It gives greater explanation of the agreement as a whole.

The principles governing the referendum will be based on those used for referendums held under UK legislation, and hence will be derived from the *Political Parties, Elections and Referendums Act 2000* (PPERA). More detail on this is available in Standard Note 5142, [Regulation of Referendums](#), 16 October 2012.

The referendum is to be held before the end of 2014, in line with the Scottish Government's preference for a poll in autumn 2014. The date of the referendum will be included in the Scottish Parliament's legislation, and it must be a day when no other poll is held under Scottish Parliament's legislation. This effectively prevents a second referendum on a greater level of devolution ("devo max").

In addition, there will be a single question. This is set in the Order, so it is a legally binding point: Article 3 of the Order inserts a new paragraph 5A into Schedule 5 of the 1998 Act, which includes sub-paragraph 4:

There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses.

The wording of the question will be included in the Scottish Parliament's legislation, and will be fixed only on the passage of that bill. On 9 November 2012 the Scottish Government confirmed that its proposed question is, "Do you agree that Scotland should be an independent country?" to which voters will be asked to respond "yes" or "no".<sup>1</sup> The proposed question will be reviewed by the Electoral Commission, as is the case for other referendums held under PPERA. This is not reflected in the draft Order, as it is already the case that the Electoral Commission may offer advice and assistance to the Scottish Government and Scottish Parliament, under section 10 of PPERA. The Electoral Commission will report on the question, and this will be laid before the Scottish Parliament. The Scottish Government will also respond to the report. As with UK referendums, the Scottish Government is not obliged to follow the Electoral Commission's advice. The Electoral Commission has indicated that it will report within 12 weeks, hence by 1 February 2013.<sup>2</sup>

The franchise will be based on those entitled to vote in Scottish Parliament and local government elections. However, the Scottish Government has indicated that it will seek to extend the franchise to 16 and 17 year-olds for this referendum, and it has proposed paving legislation in order to facilitate this. The franchise will be included in the legislation to be brought before the Scottish Parliament. That Parliament will decide whether to approve the proposal: the draft Order is silent on the franchise.

The Electoral Commission will carry out in respect of the Scottish referendum many of the functions which it would perform for a referendum held under UK legislation. It has published a [document](#) setting out its involvement and the principles it expects should be followed.<sup>3</sup> Its role will include, as mentioned, commenting on the wording of the question, and also registering campaign groups, designating lead campaign groups, regulating spending, publishing guidance for permitted participants and reporting on the referendum process. It will not give grants to lead campaign organisations, under a Scottish Government proposal that such groups should not be given grants of public money. Also, it will not be responsible for the conduct of the poll and the announcement of the result. In line with the arrangements for local and parliamentary elections in Scotland, these two functions will be coordinated by the Electoral Management Board and carried out by local returning officers directed by a Chief Counting Officer.

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<sup>1</sup> [HReferendum question to be tested](#)H, Scottish Government news release, 9 November 2012. This was the subject of a report by the Scottish Affairs Committee in May 2012, [HThe Referendum on Separation for Scotland: do you agree this is a biased question?](#)H HC 1942 2010-12, 8 May 2012.

<sup>2</sup> [HElectoral Commission referendum question testing with voters begins](#)H, Electoral Commission news release, 9 November 2012

<sup>3</sup> [HUpdate briefing on Scottish referendum](#)H, Electoral Commission, November 2012

The Memorandum also addresses the regulation of the referendum campaign. This will be effected by the Scottish Parliament's legislation, and will be based broadly on the regulations set out in Part 7 of PPERA. The application of some aspects, on campaign broadcasts and free mail-shots, would be outside the Scottish Parliament's competence, so they are included in the Order.

The Scottish Parliament's legislation will include the limits for campaign finance, for which "the rules and standards set out in PPERA provide the basis."<sup>4</sup> In reaching the limits to be included in the legislation, the Scottish Government will "have regard to" the views of the Electoral Commission, will "analyse and consider" the responses to its consultation, and will "consult with" the two referendum campaigns which are already in existence.<sup>5</sup>

Regulations on donations to registered political parties are already created by Part 4 of PPERA, and these will remain in place. The Scottish Parliament's legislation will establish a regime for donations to permitted participants other than registered parties.

The two governments will respect the customary 28 day period during which ministers and public bodies refrain from publications that would have a bearing on the vote.<sup>6</sup> For Scottish Ministers and public bodies this will be set out in the referendum bill, and will be based on PPERA; the UK Government will follow the PPERA-based rules as well.

The Memorandum concludes:

The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.<sup>7</sup>

### **1.3 Draft Order**

The title of the draft Order is the *Scotland Act 1998 (Modification of Schedule 5) Order 2013*.

It is made under powers conferred by sections 30 (2) and (4) and 113 (4)(a) of the *Scotland Act 1998*.

Section 30 is as follows:

30 Legislative competence: supplementary.

(1) Schedule 5 (which defines reserved matters) shall have effect.

(2) Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient.

(3) Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of this Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Scotland.

(4) An Order in Council under this section may also make such modifications of—

(a) any enactment or prerogative instrument (including any enactment comprised in or made under this Act), or

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<sup>4</sup> *Memorandum of Agreement*, para 25

<sup>5</sup> *Memorandum of Agreement*, para 27

<sup>6</sup> *Memorandum of Agreement*, para 29

<sup>7</sup> *Memorandum of Agreement*, para 30

(b) any other instrument or document,  
as Her Majesty considers necessary or expedient in connection with other provision made by the Order.

Section 113 defines the scope of subordinate powers under the Act, including in 113 (4)(a) that:

- (4) A power includes power to make —  
(a) any supplementary, incidental or consequential provision, [...]

So, section 30 allows the list of reservations in Schedule 5 to be modified. As noted above, the UK Government believes this to be necessary, since in its view the reservation of “the Union of the Kingdoms of Scotland and England” as “an aspect of the constitution” in paragraph 1 (b) of Schedule 5 to the 1998 Act means that the Scottish Parliament does not have competence to legislate for a referendum on independence at present.

Article 3 of the draft Order modifies Schedule 5 to the 1998 Act. It states that paragraph 1 of that Schedule does not reserve “a referendum on the independence of Scotland from the rest of the United Kingdom” so long as certain conditions are met. These are that the poll must be held no later than 31 December 2014, that it must not be held on the same date as any other referendum by the Scottish Parliament, and that there must be only one ballot paper, which must give the voter a choice between only two responses.

Article 4 of the draft Order concerns the application of PPERA to the referendum. It applies section 127 on campaign broadcasts and paragraph 1 of Schedule 12 on a free mail-shot. It also modifies the application of section 127, in its sub-paragraph (3), to remove PPERA provisions on whether to count expenses surrounding campaign broadcasts as referendum expenses.

The Order will come into effect if approved by a resolution of each House of Parliament and by a resolution of the Scottish Parliament.

## **1.4 Ministerial statements**

### ***House of Commons***

The Parliamentary Under-Secretary of State for Scotland, David Mundell, made a statement when the Agreement and draft Order were published. He said:

This is a significant agreement. The two Governments have agreed that there should be a referendum. We have agreed that the referendum will consist of a single question. It will offer a choice between remaining within the United Kingdom and independence. We have agreed that it must be held before the end of 2014. The referendum will be based on the normal legal framework for UK referendums, with oversight from the Electoral Commission. That includes the key issues of how the referendum question will be determined, and how the rules governing spending and campaigning will be established.

Following today’s agreement, the Government will bring forward an Order in Council under section 30 of the Scotland Act 1998.<sup>8</sup>

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<sup>8</sup> HC Deb 15 October 2012, c64

The draft Order was laid on 22 October 2012. Mr Mundell said that he hoped the Order would be approved by Parliament and made by February 2013, after which the Scottish Government would introduce a bill, setting out the wording of the referendum question, the date of the poll and the campaign rules. It would be for the Scottish Parliament to consider and vote on this.<sup>9</sup>

Mr Mundell placed some emphasis on the distinction between process, as established under the Agreement, and the substance of the debate over “the most important political decision that people in Scotland will ever take.”<sup>10</sup> He said that the UK Government had started to prepare its analysis, and

over the next year, the Government will publish thorough, evidence-based information that will set out the key issues in the independence debate. That analysis will be comprehensive, robust and open to external scrutiny. I fully expect it to show that Scotland is better off within the United Kingdom and that the rest of the United Kingdom is better with Scotland in it.<sup>11</sup>

For Labour, Margaret Curran welcomed the fact that an agreement had been reached, but said that the Opposition “will seek guarantees that both parties will adhere to the agreement in spirit and in practice.”<sup>12</sup> She said:

This is, without doubt, an historic day for Scotland and the Scottish people. Now is the time for the debate on Scotland’s future to move out of the corridors of power and on to the streets of Scotland. I join the Minister in welcoming the fact that an agreement has been reached. It brings all Scots, me included, one step closer to deciding the future of our country.<sup>13</sup>

She raised three questions. In respect of the question and the funding rules, “can [the Minister] assure the House that the memorandum of agreement ensures that the Scottish Government must comply with, not turn their back on, the Electoral Commission’s advice?”<sup>14</sup> Secondly, would trade unions, businesses or other interested third parties be able to participate in the campaign? Thirdly, what would the process of scrutiny and information in the House consist of, both in respect of the draft Order and over the coming two years?

Mr Mundell responded:

It is important that the agreement sets out a clear role for the Electoral Commission in relation to both the question and the funding of the campaigns. It is difficult to envisage circumstances in which the Scottish Government would want to ignore the Electoral Commission’s recommendations. As she said, no Government have ever done so, and there would be not just a procedural problem but a significant political price to pay for any party that sought to do so.

We should never underestimate the Scottish people. It is wrong to suggest that they could somehow be duped into supporting independence by any form of chicanery or trickery that might come from either side of the debate. They are much too sensible for that, and I have every confidence that when the referendum comes, whatever the form

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<sup>9</sup> HC Deb 15 October 2012, cc64-5

<sup>10</sup> HC Deb 15 October 2012, c66

<sup>11</sup> HC Deb 15 October 2012, c66

<sup>12</sup> HC Deb 15 October 2012, c66

<sup>13</sup> HC Deb 15 October 2012, c66

<sup>14</sup> HC Deb 15 October 2012, cc66-7

of the question and however the campaign has been funded, they will make the right decision.<sup>15</sup>

For the SNP, Stewart Hosie said:

This decision is historic, and I agree with the Minister that it is the most important that we will ever take. It also has the potential to be exciting and transformative for Scotland when the Scottish people vote yes. I very much welcome the 2014 timeline, which was of course the Scottish Government's favoured position, and the extension of the franchise to 16 and 17-year-olds—also a Scottish Government position.<sup>16</sup>

Pete Wishart indicated that the Scottish Government would release its own information on an independent Scotland in November 2013:

Today has been an utterly fantastic day. The Edinburgh agreement is the next stage in our nation's story. I cannot wait to get out and put a compelling and positive case for my nation's independence. The Minister says he wants a real choice and different visions. In November next year, the Scottish Government will release a full and comprehensive prospectus on what an independent Scotland will look like.<sup>17</sup>

### ***Scottish Parliament***

In the Scottish Parliament, Deputy First Minister Nicola Sturgeon made a statement. She said,

The Edinburgh Agreement is a watershed moment in Scotland's Home Rule journey. It paves the way for the most important decision our country will make in more than 300 years and – crucially – it ensures that Scotland's referendum is designed and delivered by this Parliament.

[...]

As set out in the Edinburgh Agreement, the Electoral Commission will play an important role in formulating the question for the referendum. The Government will refer our proposed referendum question to the Commission for review of its intelligibility. The Commission will take views from others on the proposed wording and then report on the question. The final decision on the question will, of course, be for this Parliament, taking account of the views of the Commission.

I am meeting the Electoral Commission tomorrow to discuss the next steps in its involvement, and to ensure that the process of reviewing the question takes place in good time.

I will confirm to the Commission that we seek its advice on setting spending limits that ensure a fair contest and a level playing field.

Both the section 30 order and the Government's referendum bill will be considered and scrutinised by this Parliament in the normal way. The timetable for the section 30 order—here, and at Westminster—is intended to lead to the order being agreed early next year. That will enable the Government to introduce its referendum bill shortly thereafter. We would then expect Parliament's consideration of the bill to take place

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<sup>15</sup> HC Deb 15 October 2012, c67

<sup>16</sup> HC Deb 15 October 2012, c68

<sup>17</sup> HC Deb 15 November 2012, c73



through the summer and autumn, which will allow royal assent by November 2013, approximately one year before the vote.<sup>18</sup>

## 2 Franchise

A significant point of discussion over the referendum process will be the franchise. The Scottish Government wishes to lower the voting age to 16 for the referendum. The Memorandum mentions this possibility, and the capacity to do so is implicit in the Agreement and draft Order, although it is not explicitly mentioned in the draft Order. The Memorandum states that “it will be for the Scottish Parliament to approve the referendum franchise, as it would be for any referendum on devolved matters.”<sup>19</sup>

The franchise for all *elections* in Scotland is reserved, including the franchise for local elections, although the administration of these elections is devolved.

Schedule 5 to the *Scotland Act 1998*, which lists reserved matters, includes the following:

B3. Elections

Section B3.

Elections for membership of the House of Commons, the European Parliament and the Parliament, including the subject-matter of—

(a) [the European Parliamentary Elections Act 2002.]

(b) the Representation of the People Act 1983 and the Representation of the People Act 1985, and

(c) the Parliamentary Constituencies Act 1986, so far as those enactments apply, or may be applied, in respect of such membership.

The franchise at local government elections.

There were separate consultations run by the UK Government and the Scottish Government respectively on the conduct of the referendum. The UK consultation paper in 2012 set out the alternative franchises that could be used:

Recent referendums in the United Kingdom have used either the UK Parliament franchise, or the devolved legislature and local government franchise. So, the franchise for the referendum on the voting system for the House of Commons had its basis in the UK Parliament franchise, since it was considered appropriate that those entitled to vote in UK Parliamentary elections should also be entitled to have a say in the electoral system for those elections. Similarly, the referendum on increasing the powers of the Welsh Assembly used the same franchise as for Welsh Assembly elections. It would be possible to create a new franchise, with different groups of people entitled to vote.

However, the UK Government’s view is that the existing Scottish Parliament franchise achieves the right balance of clarity, consistency, and transparency, and would be administratively straightforward to deliver. If a new franchise was created specifically for a Scottish independence referendum, it could lead to administrative complications and risk the perception that changes were being made to favour one or other outcome, and would enfranchise individuals currently ineligible to vote in Scottish Parliament elections.

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<sup>18</sup> SPOR 23 October 2012, cc12406-8

<sup>19</sup> *Memorandum of Agreement*, para 10

**In considering the two existing franchises, it is the UK Government's view that the devolved legislature and local government franchise would be most suitable. This is of course the franchise that elected the current Scottish Parliament and it was also used in 1997 for the referendum that established the Scottish Parliament. For this reason we have included provision in the draft section 30 Order (Annex A) to achieve this.<sup>20</sup>**

The Scottish Government consultation in January 2012 also proposed the use of the local government franchise for the referendum:

As proposed in the Scottish Government's 2010 consultation paper, and following the precedent of the 1997 referendum, eligibility to vote in the referendum will be based on that for Scottish Parliament and Scottish local government elections. The franchise for these elections (which is set out in UK legislation) most closely reflects residency in Scotland and has been chosen for that reason. The choice of this franchise reflects the internationally accepted principle that the franchise for constitutional referendums should be determined by residency and the Scottish Government's view that sovereignty lies with the people of Scotland. The Scottish Government notes that the UK Government has also concluded that this is the most appropriate franchise for the referendum.<sup>21</sup>

The two governments therefore agreed that all those entitled to vote in Scottish Parliamentary and local government elections in Scotland should be able to vote in the referendum. As noted above, the section 30 Order enables the Scottish Parliament to legislate for the referendum, and that legislation will set out the franchise, including any extension beyond the local government electorate, for instance on the basis of age.<sup>22</sup>

In his statement on the referendum agreement Mr Mundell gave further details about the franchise:

Both Governments agree that all those who were entitled to vote in the Scottish Parliament elections in May 2011 should be able to vote in the referendum. As with all referendums held in any part of the UK, it will be the legislation that establishes the referendum that sets the franchise. It will therefore be for the Scottish Parliament to define the franchise in the referendum Bill, as would be the case for any other referendum—or indeed election—on matters within its devolved competence.

Although both Governments agree that the basis of the franchise will be that for the Scottish Parliament elections, the Scottish Government have proposed to extend the franchise to allow 16 and 17-year-olds to vote. It will be for them to make the case for that change and to deal with the technical issues that may arise. There is, of course, a range of opinions in this House about changes to the voting age. However, having agreed the principle that the Scottish Parliament should have the legal power to legislate for the referendum—that it should be a referendum “made in Scotland”—the Government accept that it should be for the Scottish Parliament to determine the franchise. I fully expect that the Scottish Government's proposals will be debated robustly in the Scottish Parliament. Any decision taken by the Scottish Parliament for the referendum will not affect the voting age for parliamentary and local government elections anywhere in the United Kingdom.<sup>23</sup>

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<sup>20</sup> Cm 8203 H <http://www.scotlandoffice.gov.uk/scotlandoffice/files/17779-Cm-8203.pdf>H

<sup>21</sup> H *Your Scotland, Your Referendum: consultation 2012*H, Scottish Government

<sup>22</sup> H *Agreement between the UK Government and the Scottish Government on a referendum on independence for Scotland*H, 15 October 2012

<sup>23</sup> HC Deb 15 October 2012 c65

It was suggested that this would create a precedent for other elections, but Mr Mundell said that the UK Government had no plans to change the voting age.<sup>24</sup> Ann McKechin sought assurances that 16 and 17 year-olds would be able to register to vote in the same way as adults over the age of 18. The Minister drew attention to some of the difficulties that would arise from extending the franchise for the referendum:

As the hon. Lady knows, that is one of the significant complexities that the Scottish Government will face if they bring forward their proposals to allow 16 and 17-year-olds to vote. If they use the current electoral register, they will essentially allow only those who are 16 years and 10 months old to vote. If they wish all 16 and 17-year-olds to vote, they will have to create their own register, and that carries with it significant complexities.<sup>25</sup>

The Scottish Government has proposed paving legislation to create circumstances in which “every single person in Scotland who is aged 16 or over on the day of the referendum will be in a position to vote.”<sup>26</sup> The Electoral Commission has published a [response](#) to the Scottish Government’s proposals for a bill on the referendum franchise.<sup>27</sup>

On 23 September 2012 the Scottish edition of the *Mail on Sunday* carried a poll of voting intentions among those who would benefit from the reduction in voting age. This suggested that the majority was against independence.<sup>28</sup>

## 2.1 The franchise for Scottish Parliament elections

The franchise for the Scottish Parliament is the same as that for local government elections in Scotland:

- British and other qualifying Commonwealth citizens who are resident in Scotland
- Citizens of the Irish Republic who are resident in Scotland
- Citizens of other European Union (EU) countries who are resident in Scotland
- Service/Crown personnel serving in the UK or overseas in the armed forces or with Her Majesty’s Government who are registered in Scotland
- Members of the House of Lords resident in Scotland

Citizens of any other countries who are living in Scotland are not eligible to register. Overseas electors (British citizens living overseas who are registered in Scotland) cannot vote in these elections although service personnel serving overseas can (see above).

## 2.2 Attainers

A person under the age of 18 can be included on the electoral register before their eighteenth birthday so that they can vote as soon as they attain the age of 18. The annual household canvass form asks for details of all 16 and 17 year-olds at that address including their dates of birth. This enables the Electoral Registration Officer to determine whether they are eligible to be registered or not. The Electoral Commission gives further details in its guidance for EROs:

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<sup>24</sup> HC Deb 15 October 2012 c68

<sup>25</sup> HC Deb 15 October 2012 c71. Standard Note 1747, [H Voting age](#), gives background to recent calls for the law to be changed to lower the voting age to 16, and it includes details of reports on the issue by the Electoral Commission and the Youth Citizenship Commission.

<sup>26</sup> Alex Salmond, quoted in [H 16 and 17 year-olds to have Referendum vote](#), Scottish Government press release, 20 October 2012

<sup>27</sup> [H Electoral Commission response to Scottish Government proposals for a Referendum Franchise \(Scotland\) Bill](#), Electoral Commission, January 2013

<sup>28</sup> There was further coverage in the [H Scotsman](#), 24 September 2012.

8.4 The minimum voting age is 18 years and anyone who will reach the age of 18 on or before the day of a poll is entitled to vote at that election if they are included on the relevant register of electors and not subject to any legal incapacity to vote. A person can be included on the register before their eighteenth birthday so that they may vote as soon as they attain the age of 18 years. Applications can be accepted if the applicant will be 18 years of age before the end of a 12-month period starting from the next 1 December after the application is made.

8.5 For example, if an application for registration is made in the summer by a person who is not yet 18, the applicant meets the age qualification if they will be 18 within a 12-month period starting from 1 December of that year. A person applying in December meets the qualification if they will be 18 within 12 months of the 1 December of the next year – almost two years away.<sup>29</sup>

## 2.3 Number of attainers in Scotland

The total electorate for the Scottish Parliament and local government elections in Scotland as at 1 December 2011 was 4,008,411. There were 44,341 attainers on the register who would reach their eighteenth birthdays during the life of that register, ie between 1 December 2011 and 30 November 2012.

**Table 1 Total number of electoral registrations, by Electorate, 2011**

Electorate		2011
UK Parliament	Total electorate	3,941,592
	Attainers	43,940
	Service voters	2,578
	Voluntary patients <sup>2</sup>	N/A
	Overseas electors	1,188
Local Government and Scottish Parliament	Total electorate	4,008,411
	Attainers	44,341
	Service voters	2,578
	Voluntary patients <sup>2</sup>	N/A
	Peers	58
	Citizens of the European Union	67,949
European Parliament <sup>3</sup>	Total electorate	3,941,991
	Attainers	43,941
	Service voters	2,578
	Voluntary patients <sup>2</sup>	N/A
	Peers	58
	Overseas electors	1,188
	Citizens of the European Union	343

[Footnote 1] The reference date for 2000 and 2001 is 16th February. For recent years, the reference date is 1st December.

[Footnote 2] Since 2002 voluntary patients are no longer counted separately and are now included in the main body of the electorate.

[Footnote 3] The total figures for the European Parliamentary electorate were revised in September 2008. Previously published tables did not include Overseas electors in this total.

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Source: General Register Office for Scotland *Electoral Statistics 1<sup>st</sup> Dec 2011*, [Table 1](#)

## 2.4 Voting age for other elections in Scotland

Although the Scottish Parliament does not have the powers to legislate to alter the franchise for local and Parliamentary elections, it has passed legislation recently to allow 16 and 17

<sup>29</sup> [HManaging electoral registration in Great Britain: guidance for Electoral Registration Officers](#), Electoral Commission, 2012, Part B

year-olds to vote in the Health Board elections and in the elections to the Crofting Commission.<sup>30</sup>

### 3 Reports by Select Committees

#### 3.1 Lords Constitution Committee

On 13 November 2012 the House of Lords Select Committee on the Constitution published its report, *The Agreement on a referendum on independence for Scotland*.<sup>31</sup> This welcomed aspects of the Agreement addressing the legislative competence of the Scottish Parliament, the requirement for a single question and the involvement of the Electoral Commission. However, the Committee also raised concerns.

The Committee's Chairman, Baroness Jay of Paddington, said:

We welcome the fact that the Agreement reached between the two Governments takes account of the Committee's previous recommendations. However, we are concerned that there are still many potential pitfalls ahead.

Proceeding via a ministerial order makes the opportunity to the UK Parliament to contribute to the process almost negligible. And neither the UK nor the Scottish Parliaments had the opportunity to contribute directly to the private negotiations on the Agreement. We are also concerned about allowing younger people to vote, potential legal challenges to the order and the fact that the rules on financing the referendum have not been agreed.

For other referendums the Electoral Commission has a key role to play in advising on the intelligibility and neutrality of the question to be asked. Although the Agreement states that the Commission will advise on the wording of the referendum question, we are concerned that its advice might not be followed.

In order for this referendum to be timely, robust and secure, further work is necessary to ensure that these issues are resolved.<sup>32</sup>

The Committee argued that the use of an Order under section 30 of the 1998 Act "significantly curtails the opportunity of the UK Parliament to have an effective input into the process."<sup>33</sup> The Order, like other secondary legislation, will not be amendable.

The Committee also argued that the Order would be open to challenge before the courts. For example, if an interested party were to claim that the Order was *ultra vires* the 1998 Act, they could seek judicial review. The Committee did not consider it likely that such a claim would succeed, but it drew attention to the potential for delay, and made the point that the two governments may not have achieved their stated aim of putting the legal base for the referendum beyond doubt.<sup>34</sup> The Committee gave an example of how a case might be made:

25. For example, a challenge to the section 30 Order could conceivably be brought on *Padfield* grounds.<sup>[25]</sup> In *Padfield* (one of the leading cases on administrative law in the 20th century) the House of Lords held that statutory powers may be used only to promote—and not to frustrate—the policy and objects of the Act that conferred the

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<sup>30</sup> [HHealth Boards \(Membership and Elections\) \(Scotland\) Act 2009](#)<sup>H</sup> and [HCrofting Commission \(Elections\) \(Scotland\) Regulations 2011](#)<sup>H</sup>

<sup>31</sup> 7<sup>th</sup> report 2012-13, HL 62 2012-13

<sup>32</sup> [HAgreement on Scottish independence referendum leaves questions to answer, say Peers](#)<sup>H</sup>, House of Lords Select Committee on the Constitution webpage, 13 November 2012

<sup>33</sup> Para 19

<sup>34</sup> Paras 23-4

powers in question. The policy and objects of an Act are a matter of law for the court to determine, bearing in mind the Act as a whole. If a statutory power is used to frustrate the policy and objects of the relevant Act, this may amount to an improper purpose, with the exercise of the power being held to be unlawful. It has been authoritatively said both in the Court of Session and in the UK Supreme Court that the purpose of the Scotland Act 1998—indeed, "the whole scheme of devolution"—is that "the redistribution of powers should not impair but improve the government of the United Kingdom as a whole".<sup>[26]</sup> It might then be argued that it is an improper use of a devolution statute (such as the Scotland Act 1998) to arrange for a referendum on the different and separate issue of independence. A number of the Government's own statements might be prayed in aid in support of such a contention. Their January 2012 consultation paper, in arguing against the notion that the referendum should contain two questions, one on independence and another on further devolution, stated that independence and devolution are "two different issues" each of which required to be "considered separately"<sup>[27]</sup> (a proposition with which we agreed).<sup>[28]</sup><sup>35</sup>

The Committee welcomed the provisions in the draft Order that there must be only one question, and that there must not be any simultaneous referendum which might provide a second question. It also welcomed the role of the Electoral Commission in reviewing the question. However, the Committee expressed concern that the advice of the Electoral Commission should be accepted:

As would be the case for the UK Government and Parliament under PPERA, there is nothing in the MoA or in the draft section 30 Order to compel either the Scottish Government or the Scottish Parliament to accept any recommendations made by the Electoral Commission as to the "intelligibility" of the referendum question. As would be the case in Westminster, however, **we would expect any departure from the Electoral Commission's recommendations on the wording of the referendum question to be robustly scrutinised. We hope that there will be no such departure. Following the advice of the Electoral Commission would be compatible with the commitment of the Scottish Government in the MoA that "the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice."**<sup>36</sup>

The Committee also raised two technical points about the proposed question. The first was that "while the draft section 30 Order provides that a referendum on 'the independence of Scotland from the rest of the United Kingdom' is not a reserved matter, the precise meaning of this phrase remains unclear."<sup>37</sup> It felt that it would be hard for the Scottish Parliament and the Electoral Commission to do their work of scrutiny on the question when the meaning of what it related to (independence) had not been spelt out. The Scottish Government intends to publish proposals in November 2013 to give details of its model of independence, by which time progress on the bill may be advanced, and the Electoral Commission's assessment of the question should be finished. Secondly, the Committee questioned why it was necessary to prevent a second referendum on the same day, unless the UK Government agreed with the Scottish Government that a referendum on "devo max" were within competence.<sup>38</sup>

The Committee raised further concerns over the extension of the franchise to 16 and 17 year-olds, including the possibility that the administrative burden may be excessive, that, if

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<sup>35</sup> Para 25

<sup>36</sup> Para 35

<sup>37</sup> Para 36

<sup>38</sup> Para 37

the current rules on registration were preserved, most 16 year-olds would not in reality be registered to vote, and that if, as an alternative, minors were included on the register, there might be data protection implications.<sup>39</sup>

Finally, the Committee drew attention to the fact that the Memorandum of Agreement does not stipulate that the referendum *must* follow PPERA on campaign finance and the referendum rules, but instead that PPERA will provide the basis for the limits on campaign spending. It stated:

**We draw to the attention of the House how little appears to have been agreed between the Governments on these important issues. It seems that Parliament is to be invited to approve the draft section 30 Order with few guarantees that the PPERA scheme governing the fairness of referendum campaigns will be made to apply in Scotland.<sup>40</sup>**

### 3.2 Commons Scottish Affairs Committee

On 11 January 2013 the House of Commons Scottish Affairs Committee published a report on the draft Order, *The Referendum on Separation for Scotland: the proposed section 30 Order – Can a player also be the referee?*<sup>41</sup> The Committee gave the following summary of its views:

We welcome the recent agreement between the UK and Scottish Governments on a section 30 Order to allow the Scottish Parliament to hold a referendum on whether Scotland should remain part of the United Kingdom or not. The Secretary of State and his team are to be congratulated on their willingness to compromise and reach a consensus with the Scottish Government so that the referendum can be held on a basis to which all can consent.

It is of the highest importance that both sides of the argument will be willing to accept the result of the referendum, whatever it is, and that the losing side should not be able to claim that the process was biased or illegitimate. We agree, for that reason, that it is right for the referendum legislation to be passed in the Scottish Parliament and that it should therefore be given the legislative competence to do so.

A heavy responsibility therefore devolves on the Scottish Parliament to act in the same way, for the same reasons. The referendum bill must be built on the widest possible consensus in the Scottish Parliament, so that the result will be accepted by all, and by Scotland as a whole.

In a number of aspects of the process however we see that the Scottish Government appears to be minded to pursue partisan advantage, rather than seek consensus. In our earlier Report, *Do you agree this is a biased question?*, we drew attention to the unsatisfactory nature of the question proposed, but the Scottish Government is persisting with it. Despite the real difficulties caused by prolonged delay it insists on holding the referendum as late as possible, apparently in the hope of advantage from the anniversary of Bannockburn. Despite agreeing to the impartial oversight of the Electoral Commission, it has itself refused to commit to be bound by the decisions of this neutral referee. It is hard to escape the suspicion that it is following the mantra of British cycling of the 'aggregation of marginal gains'. The challenge for the SNP is to lay that approach aside and legislate for a referendum that all will agree is completely fair and as neutral as possible. This approach of reaching consensus and compromise

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<sup>39</sup> Paras 38-45

<sup>40</sup> Para 57

<sup>41</sup> 6<sup>th</sup> report of 2012-13, HC 863 2012-13



applies to such matters as donations and spending limits, and, in the absence of consensus, in our view the verdict of the neutral Electoral Commission must be accepted, not disputed.<sup>42</sup>

It concluded:

14. We welcome the fact that there is to be a referendum. The question of Scotland's future does need to be decided, and a referendum is the only authoritative way to do so. The referendum therefore needs, as the UK Government has repeatedly emphasised, to be legal, fair and decisive. Providing in the Order that there should only be one question, and that it should determine the question of separation, will ensure that the outcome is decisive, and not confused by the Scottish Government's previous aspirations to muddy the waters with an additional question. (Paragraph 51)

15. But we accept that there is an overriding aim that the result of the referendum should be accepted by all, and allowing the legislation to be made in the Scottish Parliament, with its SNP majority, will mean that supporters of separation cannot blame the legislative process for a result which is unwelcome to them. It will have been, as the Secretary of State has emphasised, 'made in Scotland'. It must also be able to secure 'losers' consent'. (Paragraph 52)

16. The involvement of the Electoral Commission is important in this respect. It is an unbiased referee, and it is important that the campaigners and the Governments agree to abide by its recommendations. We are, however, concerned that the Scottish Government has not committed to do this. We have seen, in its proposed referendum question, that it adopts an approach which does not appear to be neutral. Similarly, we are concerned about the possibility of its disregarding the Electoral Commission's advice on spending limits. It would be better for the Scottish Government—and for the Scottish people—if it agreed now to follow all the advice of the Electoral Commission on this and the other regulated and relevant matters. If it does not do so, it will leave a suspicion that it is prepared to look for what scope it can to fix the referendum rules so as to increase the chances of a "yes" vote. This would be the 'aggregation of marginal gains' used by the British cycling team to gain competitive advantage. However we believe that such an approach would be self-defeating: a "yes" vote obtained in that way would be subject to charges of illegitimacy. The result of this referendum must be accepted by all involved. The challenge for the Scottish Government, and the heavy responsibility for the Scottish Parliament in scrutinising its proposals, is to behave in a way which ensures that "the referendum is fair and commands the confidence of both sides of the debate". (Paragraph 53)<sup>43</sup>

## 4 Other reaction

The Agreement and the draft Order have been widely discussed by academics and lawyers. Starting points include the *Devolution Matters* blog by [Alan Trench](#), which covers a range of aspects of the referendum and the Agreement, and the Scottish Constitutional Futures Forum, where [Christine Bell](#) has discussed the legal status of the Agreement, and Aileen McHarg has discussed the Agreement [as a whole](#) and its [legal status](#).

## 5 Process

The draft Order was laid before Parliament on 22 October 2012. It must be passed by both Houses of Parliament and by the Scottish Parliament before it can come into force. The

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<sup>42</sup> HC 863, p3

<sup>43</sup> HC 863, pp22-3



Scottish Parliament approved it on 5 December 2012 (see below); it will be debated in the House of Commons on 15 January 2013 and in the House of Lords on 16 January 2013.

As is normal for secondary legislation, the draft Order may not be amended, but amendments may be made to the motion to approve it. Lord Forsyth has tabled two amendments in the Lords:

[Lord Forsyth of Drumlean](#) to move, as an amendment to the above motion, at end to insert "but that this House calls on Her Majesty's Government not to make the draft Order until the proposals for the date of the referendum, the proposed question and the rules governing the conduct of the referendum have been published and until both Houses of Parliament have debated those proposals".

†[Lord Forsyth of Drumlean](#) to move, as an amendment to the motion in the name of Lord Wallace of Tankerness, at end to insert "and regrets that debate in Parliament on the draft Order is taking place before the publication by the Electoral Commission of its advice on referendum campaign funding and on the proposal from the Scottish Government that the referendum question be 'Do you agree that Scotland should be an independent country?', advice which is required to be published by 1st February".

The Scottish Parliament has established a [Referendum \(Scotland\) Bill Committee](#) to consider the legislation that brings about the referendum, including the draft Order, the proposed Scottish bill on voter registration and the proposed referendum bill itself. This holds weekly meetings, and has taken evidence from the Secretary of State for Scotland, Michael Moore, the Deputy First Minister, Nicola Sturgeon, and several academics.

On 15 November 2012 the Committee agreed a motion to recommend that the draft Order be approved.<sup>44</sup> It issued a report on 23 November 2012 on the same subject.<sup>45</sup> This concluded:

48. At the Committee's meeting on 15 November, the Deputy First Minister (Nicola Sturgeon) moved motion S4M-04790, inviting the Committee to recommend approval of the draft Order.

49. During the debate, members of the Committee from all parties welcomed both the draft Order and the wider agreement. James Kelly, for Labour, emphasised the importance of the Order in providing "clarity on the legality of the referendum". Annabel Goldie, for the Conservatives, commended the Order as "a constructive conclusion to a process of negotiation ... that I think has been carried out in a mature and sensible way", and emphasised the need to "ensure that the spirit of the agreement is manifest in subsequent activity and discussions". Willie Rennie, for the Liberal Democrats, said the agreement was "a big step forward" that "allows the consent of everybody about the process to be secured". Patrick Harvie reiterated his regret that a second question was ruled out, but said he was nevertheless glad the Order had been brought forward. Linda Fabiani, for the SNP, said she regarded the Order as historic, and the agreement as important for establishing a principle of mutual respect.<sup>48</sup>

50. At the end of the debate, the motion was agreed to unanimously by the members present.

51. Accordingly, the Committee has no hesitation in recommending to the Parliament that The Scotland Act 1998 (Modification of Schedule 5) Order 2013 [draft] be approved.

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<sup>44</sup> S4M-04790, see Minutes of Committee meeting, [HREF/S4/12/4/MH](#), 15 November 2012.

<sup>45</sup> [HThe Scotland Act 1998 \(Modification of Schedule 5\) Order 2013 \[draft\]](#)H, 1<sup>st</sup> report 2012 (Session 4)

The report was debated on 5 December 2012, and the draft Order was approved on the same date.<sup>46</sup>

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<sup>46</sup> [HSP OR 5 December 2012H](#), cc14376-98 and 14410